

HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARLES G. MOORE and KATHLEEN F.
MOORE,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 2:19-cv-01539 JCC

**PLAINTIFFS' REPLY IN SUPPORT
OF CROSS-MOTION FOR SUMMARY
JUDGMENT**

Note on Motion Calendar: June 1, 2020

Oral Argument Requested

Plaintiffs Charles G. Moore and Kathleen F. Moore hereby submit the following reply memorandum in support of their cross-motion for summary judgment.

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Introduction and Summary of Argument

The Government refuses to confront or even acknowledge governing authority that defines “incomes” under the Sixteenth Amendment to exclude the kind of unrealized gains that are subject to the Mandatory Repatriation Tax (“MRT”). As the Moores previously explained, the Supreme Court reaffirmed *Macomber*’s realization-event requirement in *Glenshaw Glass* by defining Sixteenth Amendment “incomes” as “undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.” *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). The Ninth Circuit holds that language to define “‘income’ in its constitutional sense.” *Quijano v. United States*, 93 F.3d 26, 30 (9th Cir. 1996) (cleaned up). The Government’s response to this rather pertinent authority? Silence. It does not even cite *Glenshaw Glass*, let alone attempt to explain how the MRT satisfies *Glenshaw Glass*’s interpretation of the Sixteenth Amendment. It plainly does not: even the Government does not dispute that taxpayers subject to the MRT have not “clearly realized” anything. Moreover, the Government has no response to the longstanding rule that the non-current accumulations of earnings targeted by the MRT are capital, not income, and it skates past *Macomber*’s still-good holding that accumulated corporate earnings cannot be attributed to shareholders as income. For each of those three reasons—the realization-event requirement, the capitalization rule, and the attribution bar—the MRT is not a tax on income. Instead, the MRT taxes solely on the basis of the ownership of personal property, shares in a corporation, rendering it a direct tax. And because it is not apportioned, it is unconstitutional.

The MRT also violates the Fifth Amendment. While attempting to confuse the matter by focusing almost exclusively on other taxes, the Government does not seriously dispute that the MRT taxes long-ago transactions—CFCs’ accumulations of earnings in prior tax years—that have never before been taxed. And that was for good reason: the tax code has always, until now, recognized the reality that those transactions did not result in taxpayers like the Moores receiving anything on which they fairly could be taxed. The MRT breaks from that settled practice by imposing new consequences on those long-completed transactions and does so in unprecedented

1 fashion, reaching back thirty years—decades longer than in any case identified by the Government.
 2 The Government attempts to brush away the MRT’s aggravating and uniquely arbitrary features:
 3 taxing shareholders on years’ worth of corporate earnings they’ve never received, even if (like the
 4 Moores) they lack any right to demand the money from the corporation. But those are the same
 5 features the Supreme Court has held sufficiently arbitrary (even without the retroactive
 6 component) to violate constitutional due process.

7 Finally, if the Moores are right that the MRT is unconstitutional, then they are entitled to
 8 summary judgment at this time. The Government’s unsupported claim that the Moore’s might have
 9 underpaid some part of their income tax does not satisfy the Ninth Circuit’s requirement that the
 10 Government identify a basis for such a claim to avoid summary judgment.

11 Argument

12 **I. The Mandatory Repatriation Tax Is Not a Tax on “Incomes” Authorized by the Sixteenth Amendment**

13 The Government does not dispute that, if the MRT does not tax Sixteenth Amendment
 14 “incomes,” then it is a direct tax on property and unconstitutional because it is not apportioned.
 15 Although insisting that the MRT is a tax on incomes, the Government fails to rebut well-
 16 established authority to the contrary. First, the Government outright ignores binding authority that
 17 the Sixteenth Amendment requires a realization event to render a gain income, and it identifies no
 18 event by which the MRT satisfies that requirement. Second, the Government does not dispute
 19 *Macomber* to have held that a corporation’s accumulated earnings cannot be attributed to its
 20 shareholders, and it identifies no precedent that sanctions the MRT’s doing just that. Third, the
 21 Government declines to address the longstanding rule that a corporation’s accumulations of
 22 earnings in past years are capital, not income, and so cannot be taxed as income, as the MRT does.

23 **A. The Mandatory Repatriation Tax Is Not a Tax on the Taxpayer’s Income**

24 **1.** Guns out for *Macomber*, the Government simply disregards subsequent precedents
 25 reaffirming *Macomber*’s core holding that a taxpayer realizes no taxable income absent a
 26 realization event. *Eisner v. Macomber*, 252 U.S. 189, 207 (1920) (holding “income” to be a
 27

1 “gain...received or drawn by the recipient (the taxpayer) for his *separate* use, benefit and
 2 disposal”). That holding remains good law. As noted, *Glenshaw Glass* reaffirmed it, defining
 3 “incomes” as “undeniable accessions to wealth, *clearly realized*, and over which the taxpayers
 4 have complete dominion.” 348 U.S. at 431 (emphasis added). As noted, the Ninth Circuit has
 5 repeatedly recognized *Glenshaw Glass* to define “‘income’ in its constitutional sense,” *Quijano*,
 6 93 F.3d at 30 (cleaned up); *Vukasovich, Inc. v. Comm’r*, 790 F.2d 1409, 1414 (9th Cir. 1986). And,
 7 as noted, the Government has no response to any of this.

8 In fact, the Government’s position is even worse than that. It claims (at 10) that the Ninth
 9 Circuit “dismissed the notion [of] a *Macomber*-like ‘realization’ requirement” in *United States v.*
 10 *James*, 333 F.2d 748, 753 (9th Cir. 1964), and proceeds to blockquote a portion of the decision
 11 discussing *Macomber*, but omits that *James* recited and applied the *Glenshaw Glass* definition of
 12 “incomes” set out above, *id.* at 752 (holding that definition to be “clearly applicable”). In other
 13 words, *James* stands for precisely the opposite proposition of what the Government claims.

14 Subsequent precedent aside, the Government’s attacks on *Macomber* miss the mark. The
 15 Government contends (at 9) that *Helvering v. Bruun* “rejected *Macomber*’s strict definition of
 16 income and limited its application to its facts,” but *Bruun* merely clarifies that so long as a gain is
 17 realized by a taxpayer, it need not be severable from the taxpayer’s property to be income—such
 18 as when a tenant constructs a building on the taxpayer’s real estate. 309 U.S. 461, 468–69 (1940).
 19 Neither that holding nor anything else in *Bruun* undermines the requirement of a realization event;
 20 to the contrary, *Bruun* recognizes that the required “realization” occurs when the gain is “received
 21 by the taxpayer.” *Id.* at 469. Similarly, the Government’s claim (at 7) that *Mariani Frozen Foods,*
 22 *Inc. v. Comm’r*, 81 T.C. 448 (1983), *aff’d sub nom. Gee Trust v. Comm’r*, 761 F.2d 1410 (9th Cir.
 23 1985), “upheld” schemes like the MRT is belied by the fact that the case involved no constitutional
 24 challenge at all.¹ Even farther off the mark are *Helvering v. National Grocery Co.*, 304 U.S. 282
 25 (1938), and *Helvering v. Griffiths*, 318 U.S. 371 (1943), neither of which recognizes (as the

26
 27 ¹ The same is true of *SIH Partners LLLP v. Comm’r*, 923 F.3d 296 (3d Cir. 2019), which (like *Mariani/Gee*) involved
 a dispute over tax liability but no constitutional claim.

Government claims, at 9–10) that “*Macomber* should be overruled,” let alone holds as much. That may explain why the Government declines to quote a single word from either decision. Further undercutting that claim is the Supreme Court’s recent application of *Macomber* in *NFIB v. Sebelius*, 567 U.S. 519, 571 (2012).²

In any instance, the Government’s policy criticisms of *Macomber* and view that it “should be overruled” are misplaced here given its concession to the reality that *Macomber* “has not been expressly overturned.” MSJ.Opp.9. The Supreme Court retains the exclusive “prerogative of overruling its own decisions,” leaving this Court to “follow the case which directly controls.” *Agostini v. Felton*, 521 U.S. 203, 237 (1997). That case is *Macomber*, as well as the subsequent precedents like *Glenshaw Glass* that reaffirm its core holding limiting income to gains realized by the taxpayer through a realization event.

Finally, that holding is dispositive of the fate of the MRT. While the Government disputes the validity of that holding at great length, it does not and cannot dispute that MRT liability is imposed in the absence of “undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.” *Glenshaw Glass*, 348 U.S. at 431. Indeed, the MRT’s application turns on no actual event at all—the Government identifies none—but a fictional “deemed repatriation” conjured by Congress out of thin air.³ For that reason, the MRT is not a tax on income and is instead one on taxpayers’ property interest in shares in foreign corporations—a direct tax. *See* MSJ.Mem.8–9. And because that direct tax is not apportioned among the states, it is unconstitutional. *NFIB*, 567 U.S. at 571.

2. The Government largely recycles its prior briefing on cases involving Subpart F and its predecessors, without answering the specific points raised by the Moores.

² Likewise, *Cottage Savings Assn. v. Comm’r*, 499 U.S. 554 (1991), does not hold that the realization requirement to be merely “a matter of administrative convenience,” as the Government claims (at 10). Indeed, the decision identifies *Macomber* as providing “the classic treatment of realization” and explains that there was no realization in *Macomber* “because no gain was realized” by the taxpayer, as here. *Id.* at 563.

³ In fact, the concept of a “deemed repatriation” event appears nowhere in 26 U.S.C. § 965.

1 To begin with, the Moores noted (at 13–14) that *Eder v. Comm’r*, 138 F.2d 27 (2d Cir.
 2 1943), did not even say what constitutional issue it was addressing, contained no reasoning at all
 3 on that issue, and would have been overruled by *Glenshaw Glass* if it had purported to dispense
 4 with *Macomber*’s realization-event requirement. The Government’s only responses to these points
 5 (at 12) are to speculate that *Macomber* (which *Eder* did not mention) “could not have been far
 6 from the court’s thinking” and to decry as “unfounded” the Moores’ questioning of the value of a
 7 claimed persuasive authority that contains no reasoning on the issue for which it is cited.

8 The Government’s treatment of *Garlock v. Comm’r*, 489 F.2d 197 (2d Cir. 1973), is equally
 9 non-responsive. As the Moores noted (at 14), *Garlock* contained scarcely more reasoning than
 10 *Eder*, which it held to be controlling. *Id.* at 202. Once again, the Government asserts (at 15) that
 11 *Garlock* recognizes *Heiner v. Mellon*, 304 U.S. 271 (1938), to have overruled *Macomber*’s
 12 realization-event requirement. And, once again, the Government declines to explain where or how
 13 *Mellon* did so or, if it did, how that could be reconciled with the Supreme Court’s subsequent
 14 affirmation of the realization-event requirement in *Glenshaw Glass*. See MSJ.Mem.13–14 (raising
 15 these points). This silence confirms what is apparent from reading *Mellon*: it did no such thing.

16 Similarly, the Moores noted (at 14) that *Whitlock’s Estate v. Comm’r* distinguished
 17 *Macomber* on the ground that there was a realization event, “an investment in United States
 18 property” by a foreign corporation under the thumb of the taxpayers. 494 F.2d 1297, 1301 (10th
 19 Cir. 1974). In response, the Government (at 13) concedes that “the liability in *Whitlock* arose when
 20 retained earnings were invested in U.S. property,” but speculates that the court may still have
 21 dispensed with the realization-event requirement because it cited *Helvering v. National Grocery*
 22 *Co.*, 304 U.S. 282 (1938).⁴ But if that were so, why wouldn’t the court have said so, and why did
 23 it identify a specific realization event and then proceed to cite *Glenshaw Glass* in the very next
 24 breath? *Id.* The Government has no answer.

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 27 ⁴ The Government also cites a decision mentioned by the Tax Court in *Whitlock’s Estate, Rodney, Inc., v. Hoey*, 53 F. Supp. 604, 607–08 (S.D.N.Y. 1944), but that decision did nothing more than state that it was bound by *Eder*.

1 The Government leaves for last *Dougherty v. Comm’r*, 60 T.C. 917 (1973), having
 2 previously given it pride of first placement, *see* MTD.3. Its demotion may relate to the fact, which
 3 the Government only now concedes (at 16), that the Tax Court specifically identified the “taxable
 4 event,” for constitutional purposes, as an “investment in U.S. property” that “manifest[ed] the
 5 shareholder’s exercise of control.” 60 T.C. at 930. The Government quibbles that this “event” may
 6 not have satisfied *Macomber*, but the court’s reasoning contradicts the Government’s position that
 7 the Sixteenth Amendment requires no realization event at all.

8 **B. The Accumulated Corporate Earnings Targeted by the MRT Are Not**
 9 **Shareholder Income**

10 The Government’s argument (at 3–5) that the corporate form may be disregarded and
 11 accumulated corporate earnings attributed to shareholders as income is beside the point and wrong.

12 It is beside the point because, as discussed above, the MRT uniquely imposes liability
 13 absent any realization event at any level, turning instead on a fictional “deemed repatriation,” and
 14 because, as discussed below, a corporation’s accumulated earnings from past years are not
 15 “income” at all. Attributing a corporation’s accumulated earnings to its shareholders does not
 16 resolve these defects and so cannot cure the constitutional infirmity.

17 Attribution would also violate the Constitution. *Macomber* expressly held as much, 252
 18 U.S. at 214–15,⁵ the Government does not dispute that it did, and the Government does not contend
 19 that *Macomber* has been overruled on this point. Nonetheless, it maintains (at 3–5) that the
 20 corporate form may be disregarded and shareholders subjected to an “income” tax on accumulated
 21 corporate earnings, citing five court decisions that do not support the point.

22 The first is *Macomber*—in particular, Justice Brandeis’s dissent. Perhaps needless to say,
 23 a dissent represents the view that lost and is not controlling.

24 The second, *Helvering v. National Grocery Co.*, upheld an “accumulated earnings tax”
 25 levied on corporations, not their shareholders. 304 U.S. 282, 284 (1938) (quoting tax provision).
 26 That tax also did not apply to past years’ earnings, but to corporations’ current-year income. *Id.*;

27 ⁵ *See also* MSJ.Mem.11–12.

1 *see also* MSJ.Mem.15–16. The court mused that Congress might tax “the sole owner of [a]
2 business” who abused the corporate form to avoid taxation. *Id.* at 288. But that was pure dicta, and
3 not even the Government contends otherwise.

4 The third and fourth—*Ivan Allen Co. v. United States*, 422 U.S. 617 (1975), and *United*
5 *States v. Donruss Co.*, 393 U.S. 297 (1969)—are cited by the Government (at 3) only as providing
6 background on corporate taxation. As with *National Grocery*, both concern versions of the
7 “accumulated earnings tax” that were levied on corporations, not their shareholders. *See Ivan*
8 *Allen*, 422 U.S. at 633; *Donruss*, 393 U.S. at 297.

9 The fifth and final case is *Helvering v. Griffiths*, 318 U.S. 371 (1943), which the
10 Government accurately describes (at 5) as “declin[ing] to revisit *Macomber*’s holding.”

11 In sum, it is undisputed that *Macomber* holds that accumulated corporate earnings cannot
12 be attributed to shareholders as income, and the Government has identified no authority that
13 undermines that holding.⁶

14 **C. The Mandatory Repatriation Tax Is Not a Tax on *Income*, But Capital**

15 The Government does not respond to the argument that a corporation’s accumulations of
16 earnings in past years are capital (i.e., shareholder equity), not income, such that a tax on them is
17 not a tax on income. As the Moores explained (at 12), *Macomber* held that the accumulation of
18 past years’ earnings is not “income” at all for purposes of the Sixteenth Amendment: “[W]hat is
19 called the stockholder’s share in the accumulated profits of the company is capital, not income.”
20 252 U.S. at 219; *see also id.* at 211 (recognizing “that the company’s accumulated profits have
21 been capitalized”); *id.* at 212 (holding that a corporation’s “antecedent accumulation of profits”
22 makes “the shareholder...richer because of an increase of his capital” without the shareholder
23 realizing “any income”). The Supreme Court reaffirmed that holding in *Glenshaw Glass*, 348 U.S.
24 at 431 (approving *Macomber*’s approach to “distinguishing gain from capital”), and that holding

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26 ⁶ Although again citing (at 11) the tax code’s treatment of partnerships and S-corporations, the Government does not
27 respond to the Moores’ cited authorities distinguishing corporations from partnerships and the point that S corporation
shareholders must unanimously consent to “flow-through” tax treatment. *See* MSJ.Mem.13 & n.10.

1 still stands, *see Nathel v. Comm’r*, 615 F.3d 83, 92 (2d Cir. 2010) (recognizing that “the earlier
 2 cases’ treatment of capital as distinct from income,” including in *Macomber*, remains good law).
 3 The Government does not identify a single instance of a tax treating past years’ earnings as income,
 4 let alone one upheld by a court as a tax on income. The only example is the tax struck down in
 5 *Macomber* that, just like the MRT, sought to tax as income “the stockholder’s share of the
 6 undivided profits previously accumulated by the corporation.” 252 U.S. at 217. There being no
 7 basis to distinguish *Macomber*, or any erosion of its holding on this point, the MRT must meet the
 8 same fate.

9 **II. The Mandatory Repatriation Tax Violates the Fifth Amendment**

10 The MRT is unprecedented in its thirty-year retroactive reach, as confirmed by the
 11 Government’s inability to identify any precedent for it. Eager to avoid confronting that point, the
 12 Government insists that the MRT has no retroactive application at all, a claim trivially rebutted by
 13 the statutory text and the fact that the MRT imposes tax liability on past transactions *that have*
 14 *never previously been taxed*. It is for that reason that the MRT is a wholly new tax and therefore
 15 constitutionally barred from retroactive application. The result is the same under the more
 16 permissive *Carlton* standard, given the MRT’s oppressively retroactive reach and uniquely
 17 arbitrary features.

18 **A. The Mandatory Repatriation Tax Is Retroactive Because It “Attaches New 19 Legal Consequences to Events Completed Before Its Enactment”⁷**

20 **1.** The Government is sufficiently anxious about its due process argument that it
 21 devotes the opening three pages (at 16–19) to attacking a straw-man definition of retroactivity that
 22 the Moores never espoused. The Moores argued in their summary judgment memorandum that
 23 “[t]he MRT is retroactive because it attaches new legal consequences—tax liability—to events
 24 *completed* before its enactment.” MSJ.Mem.18 (emphasis added); *see also Landgraf*, 511 U.S. at
 25 269–70 (reciting same standard). They did not, as the Government contends (at 16), argue that
 26 anything that leaves a taxpayer “worse off” and “implicates ‘prior conduct’” is retroactive. But

27 ⁷ *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994).

1 taking the Moores' argument as they made it would not permit the Government to attempt to tie
 2 the Moores' claim against the MRT to hypotheticals that are inapt because they do not involve
 3 *completed* events, such as contracts involving future performance (at 16, 22–23) and other
 4 “frustrated expectations” concerning future affairs (at 23). Curiously, the Government does not
 5 mention that its motion to dismiss (at 18) recited the same standard for retroactivity, from
 6 *Landgraf*, that the Moores identified as controlling.

7 **2.** The MRT's statutory text on its face satisfies the *Landgraf* standard because it
 8 attaches new legal consequences (tax liability) to events completed before its enactment (a
 9 corporation's accumulations of earnings in previous years). *See* 26 U.S.C. § 965(d)(3) (taxing
 10 “earnings and profits...accumulated in taxable years beginning after December 31, 1986”).
 11 Although the Government disputes that the MRT is retroactive, it does not deny that the
 12 accumulation of earnings in a tax year prior to 2017 is an event completed prior to enactment of
 13 the MRT. *See* MSJ.Mem.18. The Government's only response (at 19) concerning the statutory text
 14 is that the MRT has no retroactive effect because it labels those old accumulations of earnings an
 15 “inclusion” in taxpayers' current-year income. That is, as the Moores previously observed, pure
 16 sophistry, and the Government identifies no authority giving effect to such labels.⁸

17 **3.** The Government is wrong to contend (at 17) that the MRT does not attach new
 18 legal consequences to what is undisputedly completed past conduct. The Government's view (at
 19 18, 20–21) is that the tax liability of taxpayers like the Moores was “deferred,” but Subpart F did
 20 not and does not codify the maxim about death and taxes. Instead, the law simply defines what tax
 21 is due in the current tax year. Under previous law, the taxpayers who are now subject to the MRT
 22 owed no tax on CFCs' retained earnings, because no provision taxed them on those earnings.
 23 Conversely, previous law did tax distributions of CFC earnings to taxpayers. 26 U.S.C. §§ 61(a),
 24

25 ⁸ The Government's reference (at 20) to the tax code's definition of dividends is puzzling. The 1913 date referenced
 26 there—which corresponds to the ratification of the Sixteenth Amendment—actually *limits* what qualifies as a taxable
 27 dividend, and dividends are taxed as current-year income, not retroactively. *See* 26 U.S.C. § 61(a)(7) (defining “gross
 income” to include “dividends”). If Congress imposed new tax liability on dividends received thirty years ago, it
 would be subject to the same retroactivity objection as here.

301(c). That is why the Government cannot claim that the Moores had any obligation under previous law to pay tax on such earnings in any past year *or any future year* so long as they remained overseas with KisanKraft. The MRT changed that by imposing tax liability directly on past years' accumulations of earnings—the ones that were not taxed under previous law—irrespective of any actual or *de facto* distribution. That new consequence works a serious injury on taxpayers like the Moores, because they haven't actually received any distribution that they could use to pay the tax and may never see the money—after all, businesses do get sold, and others go belly up, before making any distributions to shareholders. But under the MRT, the Moores have to pay up, no matter whether they ever would have incurred tax liability under previous law.

4. The Government's continued insistence that the Tax Court's decision in *Dougherty* supports its argument against the MRT having retroactive effect is baffling, as the decision says nothing on the point. *Dougherty* does reject a retroactivity challenge to a tax statute, 60 T.C. at 929, but nowhere does it suggest that the statute did not apply retroactively. That said, the tax liability there arguably was not retroactive, because it turned on a "taxable event" (a repatriation of accumulated earnings) that occurred after enactment of the statute. *Id.* But that only underscores the unprecedented nature of the MRT, which imposes liability based on events completed years or even decades before its enactment in the absence of any post-enactment event.

Finally, little more need be said about the so-called "prior earnings" and "prior conduct" cases cited (at 22–23) by the Government, because it says nothing new about them. As noted above, its reliance on these cases is premised on the incorrect view that the Moores' claim conflates ongoing conduct (like an executory contract where payment remains to be made) with completed conduct (like a corporation's retention of earnings in a long-ago tax year). Given that the Government does not deny that a corporation's retention of earnings in a tax year prior to 2017 is an event completed prior to enactment of the MRT, and that MRT liability turns on no conduct other than that, it is indisputably retroactive in its application.⁹

⁹ The Moores did not previously address the so-called "frustrated expectations" cases cited by the Government (at 23) because they are plainly inapposite. *See also* MTD.24–26. The environmental regulation at issue in *Am. Min. Cong.*

B. The Mandatory Repatriation Tax Is a Wholly New Tax

The MRT is a “wholly new tax” because taxpayers subject to it “ha[d] ‘no reason to suppose that any transactions of the sort will be taxed at all.’” *Quarty v. United States*, 170 F.3d 961, 967 (9th Cir. 1999) (quoting *United States v. Darusmont*, 449 U.S. 292, 298, 300 (1981)). The transactions that the MRT taxes are CFCs’ accumulations of earnings in prior tax years, and those transactions were never taxed at all prior to the MRT. *See supra* § II.A; MSJ.Mem.4, 18, 22.¹⁰ And taxpayers had no reason to suppose that they ever would be: the tax code, up until the MRT, recognized the reality that those transactions did not result in taxpayers like the Moores receiving anything on which they could fairly be taxed. The Government refuses to recognize that reality or any limit on Congress’s power to subject taxpayers to wholly new retroactive exactions.

1. The weakness and unprincipled nature of the Government’s position is reflected in its lead argument (at 24–25) that any amendment made to Subpart F or any part of the income tax can never be a “wholly new” tax. Astoundingly, it asserts (at 25) that the MRT is *not a tax at all* because it merely defines a new “income inclusion[]” that, in turn, is subject to income tax. Under that view, Congress could propound a new “income inclusion” of “your wallet and your keys”—or, less cheekily, the value of all volunteer labor received by nonprofits over the past five years—and taxpayers would have no recourse but to pay up. That view is, of course, inconsistent with the standard applied in *Quarty, supra*, and it also conflicts with *Nichols v. Coolidge*, 274 U.S. 531, 533–34, 542–43 (1927), which held the Fifth Amendment to bar enforcement of *an amendment* to the existing federal estate tax that swept in transfers made before the amendment’s passage.¹¹

2. The Government does not dispute that the MRT functions differently and independently from the remainder of Subpart F. *See* MSJ.Mem.22 (describing how the MRT

v. EPA, 965 F.2d 759 (9th Cir. 1992), for example, may have frustrated expectations about what the law would be in the future, but had purely prospective effect. Unlike in those cases, the thrust of the Moores’ complaint is not that their expectations have been frustrated—although they have—but that the MRT imposes a new tax on long-completed conduct.

¹⁰ *See also* 26 U.S.C. § 952(c)(1)(A) (“Subpart F income limited to current earnings and profits”).

¹¹ The estate tax was enacted in 1916, 274 U.S. at 534 n.1; Revenue Act of 1916, 39 Stat. 756 (1916), the transfer was made in 1917, 274 U.S. at 533, and the retroactive amendment was enacted in 1919, *id.* at 539.

provides its “own unique tax rates, lookback-period, limitations on foreign tax credits, and timing provisions”). Nor does the Government deny that the MRT is a one-time assessment—indeed, it concedes the point (at 25)—rather than an amendment or revision to Subpart F’s ongoing application. *See* MSJ.Mem.22–23. While the Government does attempt (at 25) to play down the relevance of the MRT’s one-time structure, its argument rests on the mistaken premise that the transactions the MRT targets previously were taxed, when in fact they were not. *See supra* § II.A; MSJ.Mem.4, 18, 22. In that respect, the MRT does precisely what the Government denies—“reclassify previously untaxable income as taxable”—further confirming that it is a wholly new tax.

3. The Government does not take issue with the rule that a wholly new tax may not be retroactively applied and concedes (at 27) that cases like *Nichols* and *Untermeyer v. Anderson*, 276 U.S. 440 (1928), applying that rule “remain on the books” and have not been overruled. For that reason, the Court may not accept the Government’s suggestion that it decline to apply that rule here. If the MRT is a wholly new tax, then *Nichols* and *Untermeyer* are “the case[s] which directly control[]” and so must be followed. *Agostini*, 521 U.S. at 237. And they dictate the conclusion that the MRT, as a wholly new retroactive tax, is invalid.

C. The Mandatory Repatriation Tax Does Not Satisfy the *Carlton* Standard

Irrespective of whether the MRT is a wholly new tax, it also violates the rule of *United States v. Carlton*, 512 U.S. 26, 32, 30 (1994), that permits “only a modest period of retroactivity” in taxation and disapproves “harsh and oppressive” retroactive measures. If the MRT with its unprecedented thirty-year retroactive reach and other arbitrary features satisfies the *Carlton* standard, then it is difficult to imagine any retroactive exaction that would not.

1. Rather than address head-on whether the MRT’s reach exceeds the “modest period of retroactivity” permitted under *Carlton*, the Government prefers to fight the straw man of whether *Carlton* imposes a “bright-line rule.” MSJ.Opp.27–29. Its reluctance to confront the real issue is understandable because a thirty-year retroactive effect is blatantly immodest and far

1 exceeds—by decades—the “short and limited periods required by the practicalities of producing
 2 national legislation” that have previously been approved. 512 U.S. at 33. Wherever precisely the
 3 *Carlton* line lies, the MRT transgresses it, setting a new record for retroactive taxation.

4 The Government’s newly cited authorities only confirm that the MRT’s excessive
 5 retroactive reach is truly without precedent. Having tried and failed to find any authority approving
 6 retroactive taxation anywhere near as oppressive as the MRT, the Government has now abandoned
 7 the effort and turned instead to the criminal law, *United States v. Perry*, 431 F.2d 1020 (9th Cir.
 8 1970); employment law, *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948); and
 9 bankruptcy, *In re Harvard Industries, Inc.*, 352 B.R. 613 (Bankr. D.N.J. 2006). *See* MSJ.Opp.38.
 10 Even putting aside the questionable relevance *vel non* of these cases, they add nothing. *Perry*
 11 upheld a retroactive application of an anti-kickback criminal offense on the ground that “there can
 12 be no due process objection when the defendants’ course of conduct is in violation of the
 13 longstanding public policy against kickbacks,” without any comment on the duration of
 14 retroactivity. 431 F.2d at 1024. *Battaglia* upheld the Portal-to-Portal Act notwithstanding that it
 15 upset preexisting contractual rights, again without any comment on the duration of retroactivity.
 16 169 F.2d at 260–61. And, as the Government acknowledges (at 28), the bankruptcy court decision
 17 in *Harvard Industries* “did not involve a constitutional challenge,” and it says nothing of relevance
 18 here. It speaks volumes that the Government regards these random cases as its strongest
 19 precedents, and they reflect the Government’s apparent recognition that the only constitutional
 20 line that the MRT could satisfy is no line at all.

21 **2.** The MRT is also “arbitrary and irrational,” *Carlton*, 512 U.S. at 30, in taxing CFC
 22 shareholders on accumulated earnings that are not in any sense theirs and in targeting long-ago
 23 reported earnings that a CFC may no longer possess or be able to access in liquid form. While the
 24 Government asserts (at 31–32) that these features are “remedial,” it does not dispute that the MRT
 25 does not further the tax-avoidance rationale that justifies the rest of Subpart F. *See* MSJ.Mem.26.
 26 To the contrary, the MRT targets only accumulations of earnings that were and are *excluded from*
 27

1 *the ordinary operation of Subpart F*. The sole purpose served by the MRT’s retroactive application
2 is to generate revenue, a non-remedial purpose. *See GPX Intern. Tire Corp. v. United States*, 780
3 F.3d 1136, 1144 (Fed. Cir. 2015). The Government contends (at 31) that taxpayers would receive
4 a “windfall” because accumulated earnings could now be repatriated “tax-free,” but that deduction
5 is unavailable for individual taxpayers like the Moores. *See* 26 U.S.C. § 245A(a) (limiting
6 deduction to “domestic corporation[s]”). If they ever receive a distribution from KisanKraft’s
7 accumulated earnings, rest assured that the tax collector will receive his part. *See* 26 U.S.C.
8 §§ 61(a), 301(c).

9 Beyond merely arbitrary, and encroaching on “harsh and oppressive,” is the MRT’s
10 application to minority shareholders like the Moores who lack the power to compel distribution of
11 the years and years of reinvested earnings that the MRT deems to be theirs. The Government
12 contends (at 32) that this is “consistent[] with the rest of the subpart F framework,” but it is not.
13 As noted, previous law did not tax the retained earnings now subject to the MRT and did not
14 operate retroactively. And even where minority shareholders were on the hook for taxes on
15 earnings they may not have received directly, their liability was limited to current-year earnings
16 and distributions, giving them the ability to avoid additional tax liability in subsequent years by
17 disposing of their shares. 26 U.S.C. §§ 301(c), 951(a), 952(c)(1). By contrast, the MRT imposes
18 tax liability for thirty years’ worth of retained earnings in one fell swoop, and the earnings it
19 targets—because they were retained—were invested in the business and so are unlikely to be
20 available for distributions. It was exactly that kind of treatment—taxing trust beneficiaries on
21 income that they “have no right to demand...and are uncertain ever to receive”—that the Supreme
22 Court found sufficiently arbitrary to violate constitutional due process in *N. Carolina Dept. of*
23 *Revenue v. The Kimberley Rice Kaestner 1992 Fam. Tr.*, 139 S. Ct. 2213, 2221 (2019). The best
24 the Government can do to attempt to distinguish *Kaestner* is to point out that it was decided under
25 the Fourteenth Amendment’s Due Process Clause rather than the Fifth Amendment’s, that there
26 can be uncertainty whether corporations will make distributions, and that the Moores can vote their
27

1 small share in favor of distributions. MSJ.Opp.33. But none of that gets past the fact that, as
 2 minority shareholders, they have no right or ability to force a distribution and are uncertain ever
 3 to receive one, just like the trust beneficiaries in *Kaestner*.

4 **3.** *GPX Intern. Tire Corp. v. United States*, 780 F.3d 1136 (Fed. Cir. 2015), although
 5 not binding on this Court,¹² provides a convenient overview of the factors courts have considered
 6 in challenges to retroactive statutes and is, for that reason, persuasive. While the Government’s
 7 arguments on three of the factors *GPX* identifies—whether the provision is wholly new, the length
 8 of the period of retroactivity, and any remedial purpose to retroactivity—are addressed above, the
 9 other two (uncertainty in the law and notice) also bear brief mention.

10 If there was an uncertainty in the law that the MRT clarified, the Government has not
 11 identified it. As the Government acknowledges (at 30), omission of the MRT from the 2017 tax
 12 legislation simply would not have imposed this tax. That may not have been what Congress
 13 desired—it wanted a one-time revenue windfall—but that is not uncertain or unclear in any respect.

14 As for notice, the Government does not dispute that taxpayers had no prior notice of the
 15 change in the law when the transactions it taxes were undertaken years or decades ago. While the
 16 Government does deny (at 31) that Congress “‘reverse[d] course’ to tax previously untaxable
 17 income,” that is exactly what it did, as discussed above. *See supra* § II.A; MSJ.Mem.4, 18, 22.

18 **III. If the Mandatory Repatriation Tax Is Unconstitutional, the Moores Are Entitled to**
 19 **a Refund of the Amount They Paid To Satisfy Their MRT Liability**

20 **A.** If the Court determines that the MRT is unconstitutional, then the Moores are
 21 entitled to summary judgment. The Government cannot establish a dispute of material fact over
 22 what the Moores paid to satisfy their MRT liability, and it does not even attempt to meet its
 23 threshold burden to establish a fact dispute on other tax items that might offset the claimed refund.

24 There is and can be no genuine dispute of material fact over the amount that the Moores
 25 paid to satisfy their MRT liability and now seek to recover. The Moores presented evidence that

26 ¹² Plaintiffs did mistakenly identify *GPX* as a decision of the Ninth Circuit in the text of their summary judgment
 27 memorandum, although not in the adjacent citation.

1 they *actually paid* \$14,729 in MRT liability and that they did so with an amended tax return filed
2 in fall 2018. ECF No. 29-3 ¶ 29. This amended return was *separate* from the Moores’ initial tax
3 return, which (due to their good-faith ignorance) did not include an MRT payment. *Id.* The sole
4 difference between the original tax return and the amended return was the inclusion of the income
5 associated with the MRT, and the \$14,729 payment which they now seek to recover relates only
6 to that tax. The Government concedes that it received both returns in 2018 and now possess them,
7 ECF No. 34-2, at ¶ 4, and it does not deny that it received the \$14,729 payment from the Moores
8 to satisfy their MRT liability. Accordingly, the Moores’ calculation of their MRT liability is
9 irrelevant: whether they paid too much, too little, or exactly the right amount, they are entitled to
10 a refund of what they paid if the MRT is unenforceable. Any fact dispute can therefore only
11 concern other tax items apart from the Moores’ MRT payment.

12 But the Government has not met its threshold burden to identify some factual basis for its
13 request to deny summary judgment so that it can conduct discovery respecting other tax items. The
14 Ninth Circuit held in *Ahmanson Foundation v. United States* that the Government bears a
15 “threshold burden” when it asserts, as here, “equitable setoff defenses to a tax refund suit.” 674 F.
16 2d 761, 777 (9th Cir. 1981). In particular, it must demonstrate that any claims to a setoff against a
17 requested refund “are made in good faith and are not completely lacking in substance.” *Id.* This
18 requires merely that the Government “show that its claim has sufficient substance that it is made
19 in good faith, rather than for improper purposes of deterrence and harassment.” *Id.* Only at that
20 point does the “burden shift[] back to the taxpayer.” *Id.* If, however, “the government fails to make
21 such a showing, then it may be subject to summary judgment.” *Id.*

22 The Government is subject to summary judgment here because it made no attempt to meet
23 its threshold burden. No declaration or other evidence accompanied its opposition to the Moores’
24 summary judgment motion, and the declaration accompanying its Rule 56(d) motion identifies
25 only this as the basis for its request to deny summary judgment so that it can conduct discovery:
26
27

1 It is possible that the Moores underreported income, took improper deductions or
 2 credits, or treated items inaccurately in some other way that resulted in an
 3 underassessment of their income tax liabilities, separate from the 26 U.S.C. § 965
 4 dispute. If any such issues exist, they would constitute offsets against the Moores’
 5 claimed refund.

6 ECF No. 34-2, at ¶ 5. That unsupported assertion of the mere possibility that the Moores *might*
 7 have underpaid income tax—which could be said of any taxpayer—can and should be taken as a
 8 concession that the Government has no basis for its request. Accordingly, the Government has
 9 failed to meet its burden under *Ahmanson*, and the Court, if it agrees with the Moore’s position on
 10 the constitutionality of the MRT, may therefore grant summary judgment in their favor.

11 **B.** At a minimum, the Court should grant partial summary judgment. Rule 56
 12 authorizes the Court to enter summary judgment on any claim or “part” of a claim. Fed. R. Civ. P.
 13 56(a). The Government does not contend that there is any barrier to the Court’s adjudicating the
 14 constitutionality of the MRT, and it is difficult to imagine how the Court could resolve the
 15 Government’s motion to dismiss—which asserts the constitutionality of the MRT—without also
 16 resolving the arguments to the contrary presented in the Moore’s summary judgment motion. On
 17 that point, the Government’s argument against granting judgment to the Moores at this time goes
 18 only to the amount of the refund to which the Moores would be entitled if they prevail on a
 19 constitutional claim. *See* MSJ.Opp.34. Accordingly, even if the Court agrees with the Government
 20 that ordering a refund in the amount claimed would be premature, it can and should still enter
 21 partial summary judgment on the lawfulness of the MRT and reach the issue of the refund amount
 22 at a later time. *See, e.g., First Fin. Bank, N.A. v. Christensen*, 2012 WL 2789020, at *2 (D. Nev.
 23 July 9, 2012) (granting partial summary judgment because, “while summary judgment is
 24 appropriate with respect to the Guarantors’ liability, summary judgment as to damages is
 25 premature”); *Paul v. Holland Am. Line, Inc.*, 463 F. Supp. 2d 1203, 1209 (W.D. Wash. 2006). The
 26 Government appears to concede the point. ECF No. 37, at 5.

27 Conclusion

The Court should grant the Plaintiffs’ motion for summary judgment.

1 DATED this 1st day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document, and all supporting materials, were served by CM/ECF upon the following:

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